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## The Access to Justice Bill and Human Rights Act of 1998: Britain's Legislative Overhaul Leaves the System Scrambling to Mend the Safety Net

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# THE ACCESS TO JUSTICE BILL AND HUMAN RIGHTS ACT OF 1998: BRITAIN'S LEGISLATIVE OVERHAUL LEAVES THE SYSTEM SCRAMBLING TO MEND THE SAFETY NET

*Margot Penfold Schoenborn\**

To no one will we sell, to no one will we refuse or delay,  
right or justice.<sup>1</sup>

## I. INTRODUCTION

Britain's acknowledgement of legal rights for indigents spans centuries, a tenet that formally operated much earlier in Britain than in most nations. Subsidized legal services manifested itself early in British history, first appearing in the Magna Carta of 1512. The right to counsel was later guaranteed by King Henry VII, who decreed: "The Justices . . . shall assign to the same poor person or persons counsel learned, by their discretion, which shall give their counsel, nothing taking for the same; . . . and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons. . ."<sup>2</sup> From these words a very powerful and complex system of legal aid evolved to advance court access for the lower classes.<sup>3</sup> Civil legal rights to counsel, however, are a much more recent and unique attribute of British legal aid, first funded by the solicitors' professional organization in

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\* J.D. 2000, State University of New York at Buffalo; B.A. *cum laude* 1997, Nazareth College. Special thanks to my wonderful husband, Jeff, for his numerous editing critiques and his love and constant support in all my endeavors. Thanks to my family for their encouragement, Professor Mutua for his guidance, and the help of Kirsten Barclay and the BHRLR staff in preparing this article for print, especially Jennifer Weidner.

<sup>1</sup> CHARLES K. ROWLEY, *THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES* at 3 (1991) (quoting the Magna Carta, 1215); EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 3 (1974) (quoting the Magna Carta, 1215).

<sup>2</sup> ROWLEY *supra* note 1 (quoting King Henry VII 1495 Statute).

<sup>3</sup> *See id.* at 3.

1948.<sup>4</sup> In 1985 civil legal aid was brought under the state control, where it has remained ever since.<sup>5</sup>

Subsidized legal aid is rooted in the principal of equal justice. Equal justice is a part of a moral framework that purports publicly-sponsored attorneys must act if equal justice is to be honored.<sup>6</sup>

An affirmation of unequal access to the law would nullify the moral claim of any constitutional provision, statute, administrative regulation, or judicial decision. As an empirical matter, not just as a contention of philosophy, the value of equal access is an essential element of the commonsense understanding of a legal system, just as are the virtues of a general, public, intelligible, and consistent reasoning.<sup>7</sup> The British system has long encompassed the ideal that all people should be treated equally before the law and afforded the same rights to access regardless of wealth<sup>8</sup> by providing both criminal and civil counsel to indigents.

A decade of legal reform is transforming the British legal profession, and in particular, legal aid.<sup>9</sup> These reforms, including the latest ratification of the Human Rights Act of 1998,<sup>10</sup> (hereinafter Rights Act) dramatically impact the legal aid system, the practice of poverty law, and the civil remedies available to British citizens. The stated overall objective of Britain's first set of legal reforms, encapsulated in the Green Paper<sup>11</sup>, was to ensure the public an expedient network of legal services at an affordable price.<sup>12</sup> Parliament's 1989 Green Paper sought to maintain competent legal standards and integrity while ensuring that practitioners had the aptitude necessary to offer reliable services.<sup>13</sup> However, there was an overwhelming

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<sup>4</sup> See Michael Burrage, *Mrs. Thatcher Against the 'Little Republics': Ideology, Precedents, and Reactions*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* 125, at 137 (Terence Halliday & Lucien Karpick eds., 1997).

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 3.

<sup>7</sup> JACK KATZ, *POOR PEOPLE'S LAWYERS IN TRANSITION* 1 (1982).

<sup>8</sup> MARK KESSLER, *LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATION POLITICS* 2 (1987).

<sup>9</sup> *THE WORK AND ORGANIZATION OF THE LEGAL PROFESSION*, 1989, CM. No. 570. [hereinafter MGP].

<sup>10</sup> HUMAN RIGHTS ACT 1998 §22 (9 Nov. 1998). This Act, which enforces the European Convention on Human Rights (ECHR), is projected to come into full force in late 2000 or 2001.

<sup>11</sup> See MGP *supra* note 9.

<sup>12</sup> See *id.* at 1-2.

<sup>13</sup> See *id.*

public outcry opposing the Green Paper's radical recommendations, including a complete reconstruction of the split profession. In response, Parliament drafted and adopted a compromised version of these recommendations: *Legal Services: A Framework for the Future*, commonly referred to as the White Paper of 1989.<sup>14</sup>

Although the British legal aid system has long been one of the world's most progressive legal aid schemes, government overspending and the exclusion of medium-income groups from accessing counsel and courts<sup>15</sup> jeopardized it. The White Paper's legal aid reforms created a demand-led system that, while inclusive of and beneficial to the legal needs of the poor, broke the legal aid bank and failed the lower-middle class.

The newly enacted Access to Justice Act 1999<sup>16</sup> (hereinafter Justice Act) seeks to repair the White Paper's shortcomings by redefining legal aid services and fees. The Justice Act creates stringent stipulations on legal aid practitioners, re-vamps the legal fee structure and narrows the scope of legal services for indigents. Concurrently, the Human Rights Act, among other things, provides greater remedies and court access to citizens with civil rights claims. This note seeks to project the impact of these Acts on legal aid services and funding for the poor.

The international standard for legal aid is meager. While the Universal Declaration of Human Rights<sup>17</sup> (hereinafter UDHR) provides for rights to a criminal defense<sup>18</sup> it circumvents the issue of whether the right to an "effective remedy"<sup>19</sup> requires civil legal assistance. Likewise, the European standard for legal assistance under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>20</sup> asserts

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<sup>14</sup> See LEGAL SERVICES: A FRAMEWORK FOR THE FUTURE 1989, CM. No. 740 [hereinafter White Paper].

<sup>15</sup> Lord Mischoon argued for research on legal aid prior to reformation, and commented on the economic and social backlashes of the system failing to reach the middle class: "[W]e still find a gap in our justice system. It is still too expensive for people in the medium income group." *Hearing on Legal Aid Reform Before Parliament* (December 9, 1997 6:10 p.m.).

<sup>16</sup> See Lord Chancellor, *Access to Justice with Conditional Fees* (March 1998) (visited May 11, 1999) <<http://www.open.gov.uk/lcd/consult/leg-aid/lacon.htm>>.

<sup>17</sup> See Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3<sup>rd</sup> Sess., U.N. Doc. A/810 (1948) (hereinafter UDHR).

<sup>18</sup> See *id.* at art. 10-11.

<sup>19</sup> *Id.* at art. 8.

<sup>20</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) (hereinafter ECHR).

the right to free legal counsel for criminal defendants "when the interests of justice so require."<sup>21</sup> The ECHR provides no express provision for civil rights to counsel, however, except to require a "fair and public hearing" for civil rights matters.<sup>22</sup> British courts, however, have construed government obligations to provide counsel and court access much more narrowly than the European Court's ubiquitous ECHR interpretations.

The impetus of Britain's recent legal aid reforms was to reconfigure legal fees and narrow the scope of subsidized aid to reduce towering legal aid costs. However, the Justice Act's reforms have the potential to create significant conflict in combination with the Human Rights Act of 1998. The Human Rights Act is expected to come into force in late 2000 or early 2001. Many of the civil liberties postulated by the ECHR will be incorporated into domestic law through the Rights Act such as the right to life, privacy, and a fair trial.<sup>23</sup> Of the utmost concern is whether the legal aid restructuring initiated by the Access to Justice Act of 1999 works contra to the privileges guaranteed under the Human Rights Act. Before examining these issues, one must first understand how the legal aid system functioned prior to the Access to Justice Act of 1999 and the Human Rights Act of 1998.

## II. THE BRITISH LEGAL AID STRUCTURE PRIOR TO REFORM

One of the oldest law systems in the world,<sup>24</sup> the British legal practice is divided between two groups of professionals, each carrying different duties: barristers and solicitors.<sup>25</sup> The distinctions between the two professions dictate how the system functions and the types of services available to the public. Solicitors are general practitioners who interact directly with clients and draft all documents necessary for litigation.<sup>26</sup> Barristers, on the other hand, are litigators who try cases before the courts upon being hired

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<sup>21</sup> See *id.* at art. 6(3)(c).

<sup>22</sup> See *id.* art. 6.

<sup>23</sup> See Dan Bindman, *The Right to Redress*, 95 LAW SOCIETY'S GAZETTE 20 (1998).

<sup>24</sup> See RONALD WALKER & RICHARD WARD, *THE ENGLISH LEGAL SYSTEM*, 7TH EDITION (1994); see also Hon. Sir Robert Megarry, *Barristers and Judges in England Today*, 51 FORDHAM L. REV. 387, 388 (1992).

<sup>25</sup> See Megarry *supra* note 24, at 390.

<sup>26</sup> See Audra Albright, *Comment: Could This Be The Last Gasp? England's First Case Against the British Tobacco Industry*, 11 TEMP. INT'L & COMP. L. J. 363, 366 (1997).

by solicitors; they cannot be directly retained by clients.<sup>27</sup> Solicitors may form partnerships and often compose firms, yet barristers must remain sole practitioners.<sup>28</sup> Traditionally, solicitors hired barristers to litigate their cases before all courts. Although solicitors may now try cases in some courts, they are limited mostly to administrative or arbitration hearings.<sup>29</sup> Barristers practice law in "chambers," which are located in one of the four Inns of Court,<sup>30</sup> to which barristers must belong.<sup>31</sup> Consequently, for a case to be tried, both the solicitors' work product and the barristers' analysis and oral advocacy are needed. Realistically, to litigate a matter, a client must pay two fees: one to the solicitors' practice and another to the barrister. Not only does the split profession multiply a client's legal fees, it forces the client to pay a barrister to analyze work already expensed by her solicitor.

Britain offers government-funded legal assistance to indigents for both criminal and civil matters. Legal advice and assistance on civil matters became obtainable to British citizens under the Legal Aid Act of 1988.<sup>32</sup> Applicants seeking more than preliminary advice on civil matters had to pass the Legal Aid Board's "means/merits" test.<sup>33</sup> This test, the Green Form Scheme,<sup>34</sup> examined both the applicants' incomes and the merits of their actions before permitting them aid above a certain amount.<sup>35</sup> The "merits" portion of this test was highly subjective because all cases were considered on an individual basis, and there were no set standards for what types of actions were worthy of public aid monies.

In 1979, 72 percent of the British citizens were eligible for government-subsidized legal aid.<sup>36</sup> This percentage compares to 20 percent of United States citizens who were eligible that year.<sup>37</sup> Costs for subsidized

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<sup>27</sup> See *id.* Barristers may not solicit their own clients, but instead rely upon solicitors who seek their services, as solicitors are not permitted to try cases before all courts. See *id.*

<sup>28</sup> See *id.*; see generally, Megarry *supra* note 24.

<sup>29</sup> See Megarry *supra* note 24; see generally P.W.D. REDMOND & I.N. STEVENS, GENERAL PRINCIPLES OF ENGLISH LAW, (6<sup>th</sup> ed. 1990).

<sup>30</sup> See Albright *supra* note 26, at n.43.

<sup>31</sup> See *id.*; see also Megarry *supra* note 24, at 390.

<sup>32</sup> See generally LEGAL AID ACT OF 1988 (Eng.).

<sup>33</sup> See A.K.P. KIRALFY, THE ENGLISH LEGAL SYSTEM, 284, 368 (8<sup>th</sup> ed. 1990).

<sup>34</sup> The name was derived from the government-generated green forms that solicitors filled out to seek reimbursement for legal aid work. See *id.* at 286.

<sup>35</sup> See *id.*

<sup>36</sup> See Albright, *supra* note 26, at 367.

<sup>37</sup> See *id.*

aid grew dramatically from the 1980s into the 1990s.<sup>38</sup> While Britain's legal aid annual budget floated around £28 million in the 80s, the actual costs to the British government greatly exceeded that number.<sup>39</sup> In England and Wales, the inflated numbers resulted from annual legal aid expenses that rose from £682 million in 1990 to £1.5 billion in 1997.<sup>40</sup> This marked increase in legal aid spending took an egregious toll on the British government.

Despite the rapid ascension of legal aid costs, the service reached fewer and fewer citizens. From 1990 to 1997 the average increase in aid costs surpassed the national inflation rate, yet the number of people receiving aid (in civil and matrimonial law) dropped.<sup>41</sup> Solicitors were accused of exploiting fees by pursuing clients' claims they would not think prudent to finance from their own resources.<sup>42</sup>

But there is nothing new in this: it has been known for years that professional advisors, naturally and properly anxious for their clients to be compensated, are inclined to be more sanguine about the prospects when failure means a loss of a potential benefit rather than the suffering of a substantial actual loss. Partly it has stemmed from recognition of an unfairness inherent in the existing system: a privately funded defendant facing a legally-aided plaintiff has a choice between paying his own costs if he wins and both parties' costs if he loses; so he has an obvious incentive to pay the plaintiff something, however unmeritorious the claim, simply to restrict his losses.<sup>43</sup>

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<sup>38</sup> See *id.*

<sup>39</sup> See Albright, *supra* note 26 at n.65.

<sup>40</sup> See David Capper, *Reforming the System – Part I*, 148 NEW L. J. 1402 (1998) (quoting Lord Chancellor's speech to the Bar of Northern Ireland Conference on Feb. 21, 1998); see also Darryl Greer, *The Legal Aid Gravy Train*, 149 NEW L.J. 221 (1999).

<sup>41</sup> See Lord Chancellor, *supra* note 16; see also Lord Chancellor, *Law Society Speech at Cardiff* (Oct. 18, 1997) <<http://www.open.gov.uk/lcd/consult/leg-aid/lacon.htm>>.

<sup>42</sup> See RT Hon., Lord Bingham of Cornhill, Lord Chief Justice of England, *The Barnett Lecture* 18, 11 (June 11, 1998) (visited May 11, 1999) <<http://www.open.gov.uk/lcd/judicial/speeches/barnett.htm>>.

<sup>43</sup> See *id.*

Thus, the nature of Britain's "loser-pays-all" system arguably encouraged subsidized plaintiffs to pursue imprudent claims, counter to the spirit of the system.

In 1993 the British government responded to ballooning legal aid costs by initiating a major budget cut<sup>44</sup> of £43 million, which disqualified 12 to 14 million previously eligible citizens from subsidized legal services.<sup>45</sup> This response to a legal aid system that the government could no longer afford, resulted in limiting access to legal services to the very poor who still qualified for aid and the very rich with the means to pay solicitors' fees.<sup>46</sup> Those in between were excluded.

Currently, one half of Britain's lower and middle class citizens do not qualify for any type of government-subsidized aid.<sup>47</sup> Referred to as the Middle-Income-Not-Eligible-for-Legal-Aid (hereinafter MINELAS),<sup>48</sup> they fight an uphill battle in gaining access to the courts because they cannot afford to pay solicitors' hourly rates. Consequently, MINELAS are more often than not denied access to the courts, regardless of the merit of their claim.

#### A. *Parliamentary Reform Aimed at Fixing the Crumbling System*

Due to ever-rising costs, the government conducted studies in the late 1990s to assess the state the legal-aid system.<sup>49</sup> There were three major weaknesses discovered:

1. rapidly rising costs of the legal aid system and lacking mechanisms to control growth;
2. inability to target funding toward priority areas; and
3. poor legal-service value for the money.<sup>50</sup>

A major problem within the system was that it continued to be "demand-led,"<sup>51</sup> that is, all who qualified for aid received it, which removed the government's ability to control spending.<sup>52</sup> Since the system was demand

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<sup>44</sup> See Albright *supra* note 26, at 367.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*; see also *Hearing on Legal Aid Reform Before Parliament*, *supra* note 15, at 6:10 p.m.

<sup>47</sup> See Albright *supra* note 26, at 367-368, (citing Fiona Bawdon, *New Brand of Justice*, TIMES LONDON, Oct. 12, 1996).

<sup>48</sup> See *id.*

<sup>49</sup> See Lord Chancellor, *supra* note 16, at para. 3.2.

<sup>50</sup> See *id.*

<sup>51</sup> See *id.* at para. 3.3.

<sup>52</sup> See Lord Chancellor, *supra* note 16, at para. 3.4.



driven, the government could not direct legal aid funding to support policy or public interest.<sup>53</sup> Another significant weakness was that there was no method to assure lawyers' aptitudes to practice poverty law.<sup>54</sup> Since fees were paid by the government on an hourly basis, not for services rendered or results achieved, there was little incentive for efficiency. For example, a seasoned solicitor who spent 20 minutes on a will was compensated for 20 minutes of work, whereas a less experienced solicitor who spent one hour on the same document was paid for the full hour at the same rate as the experienced practitioner. Consequently, the civil legal aid system was vulnerable to reckless and fraudulent billing practices.

In the last decade, Parliament addressed the growing need for improving the system's efficiency and capacities by supporting new legislation designed to renovate the system. Reform proposals have varied, from those seeking to eliminate legal aid for civil matters, to others suggesting funding only be available to cases with a 75 percent chance of success.<sup>55</sup> Outside influences, such as the United State's contingency fee system, have slowly been incorporated into the legal aid structure, but are highly criticized in Britain as promoting bad lawyering.<sup>56</sup> Desperate to cut the imposing costs of legal aid to the Crown, Parliament sought out changes that would control costs while still permitting deserving applicants to utilize the system. In response, both the Access to Justice Act 1999<sup>57</sup> and the Human Rights Act of 1998<sup>58</sup> were approved by Parliament.

### III. THE HUMAN RIGHTS ACT AND THE ACCESS TO JUSTICE BILL MARKEDLY IMPACT LEGAL AID SERVICES

The Human Rights Act was received by Royal Assent on November 8, 1998, and will come into full force in late 2000 or early 2001. Although Britain has been a party to the ECHR since 1951, violations of the treaty were not enforceable domestically but by claimants petitioning the

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<sup>53</sup> See *id.* at para. 3.5.

<sup>54</sup> See *id.* at para. 3.9.

<sup>55</sup> Lord Campbell of Alloway refuted the 75% success rate proposed by the Lord Chancellor. See *Hearing on Legal Aid Reform Before Parliament* (December 9, 1997, 5:11p.m.).

<sup>56</sup> Lord Taverne criticized the contingent fee system as having a "corrupting effect" and creating conflicts between attorneys and their clients by not providing incentives "to put their clients or the interests of justice first." *Id.* at 6:25 p.m.

<sup>57</sup> See Lord Chancellor, *supra* note 16.

<sup>58</sup> See HUMAN RIGHTS ACT, 1998 *supra* note 10. Although the HUMAN RIGHTS ACT enacts the civil and political rights under the ECHR, the effects it has on the legal system are thought to be far reaching. See *supra* note 23.

European Court in Strasbourg, both timely and expensive endeavors.<sup>59</sup> Consequently, the Rights Act does not create any new rights but extends remedies to domestic courts that were previously unavailable by allowing citizens to pursue human rights claims in British courts.<sup>60</sup> This Rights Act, which formally incorporates provisions of the ECHR into British domestic law, requires changes in the government's perspective of legal aid funding and how the courts view legal rights, in general.<sup>61</sup> The purpose behind the Rights Act is "a wider agenda: to create a human rights culture."<sup>62</sup> It is hoped that the "public will develop a new perception of themselves as the confident possessors of inviolable fundamental rights, protected by the courts against any encroachment under whatever authority."<sup>63</sup>

This Rights Act substantially broadens the scope of remedies for use by local courts and tribunals. Prior to the commencement of the Rights Act, parliamentary or government acts could not be overturned by the judiciary unless they were deemed "irrational".<sup>64</sup> Once this Rights Act comes into force, however, the courts will be able to address government acts that violate the ECHR by ordering injunctions, quashing unlawful decisions, and awarding damages.<sup>65</sup> Consequently, the judiciary will have both more power to address government wrongs and more remedies with which to fix them. In order to prepare for the Rights Act's far-reaching changes, the government allotted £4.5 million to be spent on training the judiciary.<sup>66</sup> This Rights Act, once in full force, will be regulated in tandem with the Access to Justice Act 1999.

At the end of November 1998, the Access to Justice Act 1999 (hereinafter Justice Act) was presented to Parliament,<sup>67</sup> and subsequently enacted. This Justice Act completes the transition from "a demand-led system of public legal funding to one in which the lawyers are contracted to

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<sup>59</sup> Geoffrey Bindman, et al., *Recognising Rights - a look at the progress of the Human Rights Bill and analysis of the impact of the government's rushed terrorism legislation*, 95 L. SOCIETY GAZETTE 22 (1998).

<sup>60</sup> *See id.*

<sup>61</sup> *See* Bindman, *supra* note 23 (quoting John Wadham). John Wadham is the president of Liberty, a human rights NGO. *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See Lawyers and Human Rights*, 148 NEW L. J. 1667 (1998).

<sup>65</sup> *See id.*

<sup>66</sup> *See* Stephen Grosz, *The Right to Redress*, 95 L. SOCIETY GAZETTE 20, 27 (1998).

<sup>67</sup> *See* Dan Bindman, *Justice Bill will herald revolution- mixed reception for legal reforms*, 95 L. SOCIETY'S GUARDIAN GAZETTE NO.44, 1 (1998).

provide services within a tightly controlled budget.”<sup>68</sup> The thrust of the myriad of changes instituted by the Justice Act is to permit the government to remove money and damage claims from within the scope of legal aid.<sup>69</sup> The Justice Act also creates a new commission to administer public funds for civil and criminal work by replacing the Legal Aid Board<sup>70</sup> with the Legal Services Commission (hereinafter LSC).<sup>71</sup> The Justice Act essentially reorganizes the British legal aid system by redistributing allocated public monies through various agencies, rather than the Legal Aid Board holding the entire purse. The LSC will oversee both the Criminal Defense Service, which contracts criminal defenders, and the Community Legal Service, which will manage civil legal aid.<sup>72</sup>

*A. The Modified Fee Structure Relies on Conditional Arrangements Instead of Subsidized Aid*

The Community Legal Service will be responsible for working directly with the not-for-profit sector and funding civil contracts with solicitors.<sup>73</sup> The existing “merits test” for determining the merits of a legal aid case will be replaced by a “funding assessment.”<sup>74</sup> The funding assessment standard, intended to be more flexible than the existing test, will determine whether cases should be mediated or placed with a conditional fee arrangement.<sup>75</sup> Similar to the merits test, the funding assessment weighs whether a “reasonable person” would fund the action from her own pocket.<sup>76</sup> The LSC will have the authority to create a central fund to supplement high cost and public interest cases, even though it is assured that a majority of legal aid cases will qualify based upon the new merits test.<sup>77</sup> The new test differs from the old by determining the forum that best suits the dispute, for in-

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<sup>68</sup> See *id.*

<sup>69</sup> See Lord Chancellor, *supra* note 16, at para. 3.11.

<sup>70</sup> The Legal Aid Board was created under the Act of 1988 to administer the national legal aid system, and did so until the Access to Justice Act 1999. See REDMOND & STEVENS, *supra* note 29; see also THE LEGAL AID ACT OF 1988 (Eng.).

<sup>71</sup> Dan Bindman, *Legal Aid to go for most PI cases*, 95 L. SOCIETY'S GUARDIAN GAZETTE no.46, 1 (1998).

<sup>72</sup> See Bindman, *supra* note 67.

<sup>73</sup> See Bindman, *supra* note 71.

<sup>74</sup> See Bindman, *supra* note 67.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See LEGAL AID RULES <<http://www.open.gov.uk/lab/legal31.htm>> (visited May 11, 1999); see also *Modernising Justice White Paper*, Dec. 4, 1998 1, 1 (visited May 11, 1999) <<http://www.pfk.com/uk/insolvency/news/19981204.html>>.

stance, whether a matter would be better handled through mediation or under a conditional fee arrangement. The old test did not have that capability.

The new "funding assessment" regulation is not without criticism, however. The new merits test is criticized for being "vague and lacking in specific focus."<sup>78</sup> Critics suggest that the funding assessment should weigh various factors in granting legal aid, such as the prospects of success or failure, and the amount of damages to be recovered versus the amount of costs out at risk.<sup>79</sup> The inclusion of such elements might make the funding assessment more qualitative. Taken at face value, the funding assessment standard differs very little from the merits test, since both rely on a subjective "reasonable person" gauge. The only apparent distinction is that the funding assessment will explore alternative resolution options, such as mediation and conditional fees arrangements.

The most controversial reform implemented by the Justice Act is conditional fee arrangements for certain types of claims. The conditional fee arrangement (hereinafter CFA) system legislated by the Justice Act is not an original idea, however, since it was first introduced by Parliament in 1995.<sup>80</sup> Prior to the initial CFA 1995 legislation, an individual paid solicitor up-front for her expenses, either through legal aid money or private means. Contingency fees have slowly been introduced, and the Justice Act greatly expands their role. There were three models of contingent fees proposed originally by the 1989 Green Papers: (1) a win-lose approach, similar to the U.S. system, where the attorney is compensated if successful; (2) speculative action, under which the solicitor agrees to charge her normal fee only if case is won (as in the Scottish system); or (3) that the attorney could charge some reasonable mark-up to her normal fee upon winning.<sup>81</sup>

The preliminary Conditional Fee Law, based on the third fee model above, was first passed in 1995.<sup>82</sup> However, this fee method did not apply to all civil matters, only personal injury, bankruptcy, and cases coming before the European Court of Justice.<sup>83</sup> The fee law was passed because of legitimate concerns that the MILENAS, people with average or below-average means, desperately needed an outlet for accessing the court system with

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<sup>78</sup> See David Capper, *Reforming the System - Part 2*, 148 NEW L. J. 1447 (1998).

<sup>79</sup> See *id.*

<sup>80</sup> See Albright *supra* note 26, at 371.

<sup>81</sup> See *Contingency Fees*, 1989, CM. No. 571.

<sup>82</sup> See CONDITIONAL FEE AGREEMENTS ORDER, 1995 (Eng.). This act passed by a narrow margin of 105 for and 100 opposed. See Albright, *supra* note 26, at 372.

<sup>83</sup> See Albright *supra* note 26, at 367-368, (citing Fiona Bawdon, *New Brand of Justice*, TIMES LONDON, Oct. 12, 1996).

meritorious claims. The adoption of the conditional fee in 1995 was a monumental change to the British legal system.<sup>84</sup> It was illegal, up until this 1995 reform, for a solicitor to offer legal services on a contingency fee basis.<sup>85</sup> In 1998, conditional fee arrangements were statutorily expanded to all civil matters, except family law issues.<sup>86</sup>

The British conditional fee differs slightly from the United States', where a U.S. attorney simply takes a percentage of the client's court award. The British CFA has two components: the solicitor's hourly fee, and an "uplift" or supplemental fee.<sup>87</sup> The uplift is a percentage of the solicitor's hourly rate, not a percentage of the plaintiff's winnings.<sup>88</sup> The aim in permitting the uplift is to reward the solicitor for taking on a risky case, and to compensate her for out-of-pocket disbursements associated with litigating the matter. The uplift can be as much as double the solicitor's hourly, but the total costs cannot typically exceed twenty-five percent of the client's judgment.<sup>89</sup> While the mechanics of conditional fees differ from the United States' contingency fees, they offer similar financial incentives for legal counsel.

Nonetheless the CFA, like the U.S. contingency fee system, also encourages court access to middle income individuals who would otherwise not be able to pay lawyers' fees. Substantial disparity, however, exists between the magnitude of contingency fees on either side of the Atlantic, with more modest rewards in Britain.

The Justice Act arranges for the government to eventually move all money and damage claims from traditional legal aid funding to CFAs.<sup>90</sup> This will become possible once the market for CFAs and insurance policies

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<sup>84</sup> See *id.* at 371.

<sup>85</sup> See *id.*; see also Michael Zander, *No Win, No Fee, No Clarity*, N.Y. TIMES LONDON, Jun. 6, 1995.

<sup>86</sup> See Nicole Murray, *The new contingencies — with the erosion of legal aid, the focus is on conditional fees as never before*, L. SOCIETY'S GAZETTE 26, Feb. 17, 1999 (citing statutory agreement 1998 no. 1860); see also Lord Chancellor, *supra* note 16, at para. 2.7.

<sup>87</sup> See Albright *supra* note 26, at 373. This is similar to the Scottish legal system's conditional fee, where an "uplift" is permitted to accompany a lawyer's fee where the lawyer's client has prevailed.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See RT Hon., Lord Bingham of Cornhill, Lord Chief Justice of England, *supra* note 42. Insurance companies are offering a range of products to covers legal expenses taken on conditional fee arrangements.

for legal expenses more fully develop and gain popularity.<sup>91</sup> The response to the Access to Justice Act, not surprisingly, has been mixed.<sup>92</sup> The British Law Society is skeptical that the new arrangements will provide indigents with quality services and greater local access, primarily because of the CFAs and the franchising requirements for legal aid firms, to be discussed *infra*.<sup>93</sup>

### 1. The Limitations of CFAs Currently Outweigh the Foreseeable Benefits

Conditional fees have not been well-received by British legal society and legislators because they are thought to promote “ambulance chasing.”<sup>94</sup> Some critics predict CFAs will lead to calamities such as, “fewer people being able to pursue justifiable claims, more injustice to individual defendants unable to defend litigation, practitioners becoming commercial speculators: bankers first and lawyers second and succumbing to all the vices of American-style litigation practices.”<sup>95</sup>

The distrust associated with conditional fee arrangements stems from the philosophy that possessing a financial interest in the outcome of the case will promote solicitors to act unscrupulously.<sup>96</sup> A conflict of interest can rise between a lawyer and her clients where,

[l]awyers’ advice about settlement might be influenced all too readily by their need to be paid rather than the strict merits of any settlement offer. . . . The benefits of providing greater access to justice to clients who then have to hand over a large portion of their damages to their lawyers are a little more than dubious.<sup>97</sup>

Another problem with CFAs is that they cannot be used to defend actions. Consequently, a defendant lacking a counterclaim has to pay her attorney’s fee out-of-pocket if victorious.<sup>98</sup> Critics of the Justice Act see this new fee system as magnifying previously existing inequity: that lower income peo-

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<sup>91</sup> See *id.*

<sup>92</sup> See Bindman, *supra* note 67.

<sup>93</sup> See *id.*

<sup>94</sup> See Lord Mischon, *supra* note 15, at 6:25 p.m.

<sup>95</sup> Benedict Birnberg, *Community Legal Service*, 147 NEW L.J. 1703 (1997).

<sup>96</sup> See Albright, *supra* note 26, at 371.

<sup>97</sup> See Bindman, *supra* note 23, at 20.

<sup>98</sup> See *id.*

ple could not get civil defense legal aid nor afford private defense counsel because the loser must pay both parties' lawyers' fees.

While CFAs will inhibit frivolous claims, they also discourage solicitors from pursuing meritorious actions that would result in damages less than both parties' potential legal bills. Although conditional fees may encourage plaintiffs who fall in the legal aid gap to seek redress, the "loser-pays" rule remains a troublesome barrier to most plaintiffs because lawyers are less willing to accept conditional fees in lieu of legal aid money.<sup>99</sup> A plaintiff (and solicitor, for that matter) will want to make sure that her case is more than likely to prevail before she litigates her action because of the "loser pays" rule.<sup>100</sup> Consequently, where a claim is not an obvious winner and where fees could be extensive but recoveries minor, lawyers will hesitate to act under a conditional fee arrangement.<sup>101</sup> "Lower income people with reasonable but less-than-certain cases will find it difficult to employ a lawyer."<sup>102</sup> Hence, some claimants may be unable to pursue their claims simply because their right to legal aid has been abolished and their claim is too monetarily insignificant to litigate.<sup>103</sup>

Prior to the Act, personal injury matters could be pursued with legal aid money. Critics contend that by removing personal injury cases from within the scope of legal aid funding, claims will not be brought because conditional fees will be under-utilized by British firms.<sup>104</sup> Analysts claim that the Justice Act has the potential to compromise important human rights issues, because such matters will no longer qualify for legal aid monies because of the personal injury classification.<sup>105</sup> Moreover, court-ordered awards are traditionally low and could "discourage the use of conditional fees in complex human rights cases."<sup>106</sup> Consequently, the British Law Society is concerned that CFAs might give rise to "rationing by the back door."<sup>107</sup> Before the recent reforms, indigents with meritorious personal injury matters were virtually guaranteed counsel through subsidized aid.

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<sup>99</sup> Alan Tunkel, *The Practitioner - Conditional Fees*, 148 NEW L.J. 88 n.6824 (1998).

<sup>100</sup> See Albright, *supra* note 26, at 375.

<sup>101</sup> See *id.*

<sup>102</sup> Sir George Young, *Where we stand on the Access to Justice Bill*, Fact sheet, (visited Apr. 24, 2000) <<http://www/siregeorgeyoung.org.uk/faq/news58.htm>>.

<sup>103</sup> See Albright, *supra* note 26, at 375.

<sup>104</sup> See Bindman, *supra* note 23.

<sup>105</sup> See *id.* (quoting civil liberties specialist, Louise Christian).

<sup>106</sup> *Id.* at 20.

<sup>107</sup> See *supra* note 64. The Law Society questions whether the new merits test and contracting arrangement will give indigents less choice and access. See *id.*

Under CFAs, there are no guarantees claimants will secure counsel because solicitors do not have to extend CFAs.

Many of the larger law firms promptly developed procedures for handling conditional fee arrangements.<sup>108</sup> Risk assessment is the method by which most firms evaluate their potential CFA matters, with intent to minimize the risk of losses while maximizing court-awarded damages. Some firms focus on other factors besides risk, including rewards and resources.<sup>109</sup> "If the case doesn't involve much work or money, then to a certain extent the risk doesn't matter much."<sup>110</sup> Smaller firms have a disadvantage, however, when it comes to the resources needed to take on CFAs due to limited cashflows.<sup>111</sup> Small firms lacking the financial capacity to take on complex and high-risk matters under CFAs affirm analysts' contention that CFAs will be discouraged by solicitors and will remain an alternative unavailable to most.

In addition to barriers to CFAs becoming mainstream, CFAs might fail their purpose due to other impracticalities, such as capped success fees and insurance carriers' hesitance in underwriting CFA products. The Law Society supports limiting success fees, the set fee paid to a firm if victorious under a CFA, up to 25 percent of the damages.<sup>112</sup> This suggested cap is often downgraded by firms uncomfortable with taking such large portions of their clients' damages.<sup>113</sup> Meanwhile, solicitors' fear that success fees are insufficient to cover the costs of trying complex litigation, especially because damages are traditionally meager. Solicitors' skepticism toward CFAs will impact their availability and the standards by which they assess cases.

The regulations set by insurance carriers will also steer the CFA market. The insurance industry is carefully launching contingent-based products to cover solicitors' costs. Premiums are paid to such carriers to cover the defendant's legal costs if defeated and products are even being offered to cover plaintiffs' costs where solicitors are reluctant to adopt a CFA.<sup>114</sup> Carriers quickly learned, however, that some areas of law are

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<sup>108</sup> See Murray, *supra* note 86.

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* (citing Kerry Underwood of Underwood's firm).

<sup>111</sup> See Murray, *supra* note 86.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

<sup>114</sup> See Tom Blass, *How the Insurance Industry is Responding to the Increasing Demand for Contingency-Related Cover*, LAW SOCIETY'S GAZETTE 26, Feb. 17, 1999.



much more difficult to assess for risk than others.<sup>115</sup> Fees are a new territory to be explored by the insurance industry, which must now appraise the legal aid issues and lawyers' skills. Carriers' predisposition towards CFAs in various legal areas will lead the market for CFAs by molding policies for contingency coverage based on specific underwriting standards. Inevitably, these standards will likely become the guidelines adopted by firms in appraising whether to offer CFAs to their clients.

There are two strong arguments supporting the Justice Act's expansion of CFAs.<sup>116</sup> First, CFAs provide solicitors with greater incentives to do the most efficient work possible for their clients.<sup>117</sup> Whereas lawyers have little incentive to act at their maximum professional capacity when they are guaranteed legal aid payments, attorneys with a financial interest in the outcome are more likely to perform at optimum levels. It follows that the more meritorious the claim and the greater the stakes, the more bang a client will get for her buck.

Second, conditional fees provide court access to litigants who normally fall outside the range of legal aid qualifications, such as the MILENAS.<sup>118</sup> Consequently, CFAs grant opportunities to people who cannot afford the risk of funding their own case to pursue merit-based claims. This offers litigation opportunities that were formerly out of MILENAS' financial reach. By permitting the middle class to commence actions on a CFA basis, the gap in access to justice is narrowed. Consequently, CFAs enable legal services to reach more people, particularly those previously unable to pursue claims due to legal costs.

While holding great promise for improving the MILENAS' access to counsel and maximizing lawyers' professional efficiency, CFAs must overcome numerous hurdles before these advantages are realized. Since the Justice Act replaces legal aid funding with CFAs, the public cannot get subsidized aid in lieu of CFAs. Since CFAs are capped and court-awards are low, solicitors will not profit much more from these arrangements than they would under legal aid or their normal fees. Therefore, solicitors do not have great financial incentives in CFAs. Caps and minimal verdicts are major drawbacks that will slow the adoption of CFAs.

Until the Access to Justice Act can successfully popularize conditional fee arrangements, sectors of the population will not profit from the access CFAs can provide. These obstacles are further complicated by the court access provisions under the Human Rights Act. When enforced in

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<sup>115</sup> See *id.*

<sup>116</sup> See Bindman, *supra* note 23.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

conjunction with the Access to Justice Act, the Rights Act creates more stringent requirements for rights to legal advice and assistance.

## 2. The Right to Court Access Under the Human Rights Act Interplays with the Legal Aid Structure and CFAs

Pertinent to legal aid reform is Article 6 of the Human Rights Act which provides for access to courts in civil cases as well as the right to a fair trial.<sup>119</sup> This Article implies an “equality of arms” between parties, that is, that neither party have a substantial advantage over their opponent.<sup>120</sup> This provision in the Human Rights Act mirrors Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Both the Rights Act and the ECHR provide that “[i]n determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable amount of time by an independent and impartial tribunal established by law.”<sup>121</sup> Although Article 6 does not expressly provide for mandatory court access or free counsel, the provision under Article 6(1) has been construed as incorporating court access into the “fair trial” entitlement by the European Court. The European Court of Human Rights has implicitly held that the right to a fair hearing includes the right of access for civil rights claims.<sup>122</sup>

The European Court broadly interprets this provision as placing a duty upon a nation to supply free counsel to citizens pursuing civil rights matters. The European Court has gone so far as to say that Ireland violated a citizen’s right to court access by failing to provide civil legal aid.<sup>123</sup> The European Court held in *Airey v. Ireland* that the “obligation to secure an effective right of access to the courts necessitated positive action on the part of the State.”<sup>124</sup> It is particularly noteworthy that the European Court addressed the right to court access in this manner, since the scope of the Convention encompasses civil and political rights, not those considered

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<sup>119</sup> See HUMAN RIGHTS ACT, 1998, *supra* note 10, at art.6.

<sup>120</sup> See Birnberg, *supra* note 95; see also John Wadham, *Sources of Funding, Including Legal Aid and Conditional Fees for Claims under the Act 95 L. SOCIETY’S GAZETTE* 20 (1998).

<sup>121</sup> See HUMAN RIGHTS ACT, 1998, *supra* note 10, art.6.(1); see also The European Convention for the Protection of Human Rights and Fundamental Freedoms, art.6(1) (1948).

<sup>122</sup> See *id.*; see also *Golder v. United Kingdom*.

<sup>123</sup> See Lord Mischon, *supra* note 15 (quoting *Airey v. Ireland*, 2 EHRR 305 (1980)).

<sup>124</sup> See *id.*

economic and social. The Court acknowledged this distinction and the necessity of broadening the scope of Article 6 in the *Airey* opinion:

Whilst the Convention sets forth what are essential civil and political rights, many of them have implications of a social and economic nature. . . the mere fact that an interpretation may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>125</sup>

The European Court asserted that the government had an obligation to provide civil legal aid in cases that were complex in nature, required expert testimony, or where the suit called for emotional involvement.<sup>126</sup> Thus, some experts question whether or not Britain's implementation of the conditional fee arrangement in place of legal aid funding violates the right to court access.<sup>127</sup> The *Airey* decision constitutes a duty to provide legal aid for civil cases regarding complex procedure, complex law, those tendering expert witnesses or witness examinations, and those suits of "emotional involvement."<sup>128</sup> These ambiguous elements, however, create a loose standard for those seeking legal aid. Until the European Court establishes more definitive parameters for civil legal aid prerequisites, Britain will be left to implement reforms reflecting its interpretation of the ECHR.

This positive duty to enforce Article 6 requires careful analysis of legal aid funding. In civil cases, the case must be evaluated from the standpoint that aid should be granted where an individual could not have a fair trial without it.<sup>129</sup> Central to this standard is the comparison of the resources of both parties. "Where the other party has considerable resources, where the law or facts are complex or where disparity prevents an unfair trial, legal aid will need to be granted."<sup>130</sup> The European Court offered guidelines as to when legal aid should be granted: complex proceedings where the potential sanctions are severe,<sup>131</sup> where a defendant lacks the ability to present the case herself,<sup>132</sup> and where an applicant lacks an under-

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<sup>125</sup> See *id.* at para. 26.

<sup>126</sup> See Lord Mischoon, *supra* note 15, at 43.

<sup>127</sup> David O'Sullivan, *Legal Aid and Human Rights*, 148 New L.J. 43 n.6823 (1998).

<sup>128</sup> See *id.*

<sup>129</sup> See Bindman, *supra* note 23.

<sup>130</sup> See *id.* at 20.

<sup>131</sup> See *Benham v. United Kingdom*, 22 EHRR 293 (1996).

<sup>132</sup> See *id.*

standing of the intricacies of the law in the face of a professional prosecution team.<sup>133</sup> This is a pretty ambiguous measure, since in most actions a claimant arguably lacks the capabilities and strategic knowledge to represent themselves *pro se*.

The European Court has created affirmative responsibilities to monitor appointed lawyers' work-product in legal aid cases. In *Artico v. Italy*, the Court declared that the mere nomination of a lawyer is not sufficient to ensure effective legal assistance.<sup>134</sup> The state must be sure a lawyer fulfills her obligations to the client, and if the state is aware this duty is not met, then the state must replace the lawyer or force her to effectively assist the client.<sup>135</sup> The Court was careful to limit a state's responsibility for lawyers' malpractice, however. In *Kamasinski v. Austria*, the European Court determined that regardless of whether a person is legally aided or privately funded, the goings on between the person and her counsel runs independent from any state obligation.<sup>136</sup> Accordingly, while the state has a duty to provide court access by providing legal aid in certain instances, they are ultimately not responsible for any errors or omissions committed by legal-aid funded lawyers.

### 3. CFA's Are Likely Insufficient to Provide Court Access Under the European Court's Standard

The European Court "makes no distinction between the effective right of access of individuals with a 75 percent chance of succeeding in litigation and those with, say, a 51 percent or 65 percent chance of success."<sup>137</sup> Consequently, the distinction drawn by the British CFA scheme might contradict the purpose envisioned by the European Court. Specifically, should the an individual's right to access rest on her ability to convince a solicitor to take the case on a conditional fee arrangement?

In the case of *R. v. Home Secretary, ex parte Leech*, the British court recognized a right of unimpeded access to the courts.<sup>138</sup> More recently, the court declared that relief granted to individuals on income support which paid their court fees could not be repealed.<sup>139</sup> Although this

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<sup>133</sup> See *Granger v. United Kingdom*, 12 EHRR 293 (1990).

<sup>134</sup> See 3 EHRR 1 (1980).

<sup>135</sup> See *id.*

<sup>136</sup> See 13 EHRR 1.

<sup>137</sup> See 13 EHRR 1.

<sup>138</sup> See *R. v. Home Secretary, ex parte Leech* (No. 2) QB 198 (1994).

<sup>139</sup> See *Bindman, supra* note 15 (quoting *R. v. Lord Chancellor, ex parte Witham*, 2 All ER 779 (1997)).

ruling declared a provision eliminating such relief as unlawful, the court's interpretation of the right of access falls short of that of the European Court.<sup>140</sup> The British courts acknowledge the government's right to regulate the payments of legal aid fees.<sup>141</sup> Therefore, the British judicial system perceives the right to access as a "negative formulation: it prevents the government (in absence of express statutory authorization) from putting up barriers in the way of the litigant. Indeed, the phraseology in the prior case of *Leech* of a right of unimpeded access to a court suggests a negative right, a 'freedom from'".<sup>142</sup> Alternatively, the European Court of Human Rights interpreted the right as one requiring state action.<sup>143</sup> Therefore, the ECHR interprets the right to access as an affirmative right, while Britain views it as a negative right.

Treaties encompassing civil and political rights, such as the ECHR, are often perceived as those which enforce legal rights by prohibiting state interference and are referred to as negative rights. Alternatively, treaties enforcing economic and social rights are seen as programmatic. That is, the implementation of social and economic programs by a state requires government action, and is classified as positive rights. Positive and negative rights are completely intertwined, however. For example, one cannot realize a political right, such as the right to vote, if one cannot exercise a basic social right, such as one's right to survival. Likewise, one needs political power in order to be able to defend it. Therefore, it is significant that the European Court recognized the interdependency of these rights in the *Airey* case because it extended a state's duty not to prevent court access to include providing legal assistance.<sup>144</sup>

Although the CFA provisions in the Access to Justice Bill would not explicitly violate the Human Rights Act Article 6 requirement of the right to access, there is some potential conflict in enforcing both pieces of legislation. Before these Acts, all indigents were eligible for legal aid services to pursue civil actions. Violations may arise where a case does not qualify for aid, and is refused by solicitors under a CFA due to potential costs or complexity. If indigents are denied both legal aid and CFAs for a merit-based case, then Britain's incorporation of Article 6 under standards established by the European Court will fail. This probability raises some administrative problems, as well, because the government cannot force firms to offer CFAs. Therefore, while the reforms work under a pretense

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<sup>140</sup> *See id.*

<sup>141</sup> *See Bindman, supra* note 15.

<sup>142</sup> *See supra* note 7.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

that citizens not qualifying for legal aid services can enter into CFAs with private solicitors, this preconception is flawed. The government has no established method to monitor fee arrangements nor ensure the consistency of their availability to the public. Consequently, while the adoption of CFAs does not by itself transgress Article 6, the possibility that indigents no longer qualifying for subsidized aid will be denied fee arrangements flies in the face of the *Airey* decision.

*B. Franchising Requirements for Law Firms Greatly Reduced the Number of Firms Eligible to Offer Legal Aid Services*

Another consideration is that the Justice Act limits the numbers of practitioners in certain areas by requiring solicitors and barristers to be experienced specialists in order to practice in certain areas, such as medical malpractice.<sup>145</sup> The Justice Act required that beginning in January 2000 only firms with "clinical negligence franchise"<sup>146</sup> licenses were able to offer advice and assistance (Green Form) legal aid.<sup>147</sup> The system formerly authorized all licensed solicitors to provide legal aid services under the Green Form scheme. Prior to the Act, specialization in a particular area of law was not required for solicitors to practice. Therefore, the new arrangements seek to deliver the most adept services per legal aid pound from highly qualified solicitors.

More than 5,000 firms applied to the LAB for legal aid franchises.<sup>148</sup> This number, however, represents less than half of the firms currently providing legal aid services.<sup>149</sup> "Although the LAB claims there is no limit on the legal aid franchises available, it accepts there will be a reduction in suppliers, as some firms will not apply."<sup>150</sup> It is predicted many firms will no longer perform legal assistance, either because they did too little of it to start or because they will not meet the LAB's standards for franchising.<sup>151</sup> Many firms provided legal aid services, but legal aid did not constitute the bulk of their caseload. In fact, the Law Society forecasts that

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<sup>145</sup> See Steve Orchard, *Criminal Negligence Franchises*, 148 NEW L.J. 1744 n.6866 (1998).

<sup>146</sup> See *id.*

<sup>147</sup> See Alison Clarke, et al., *supra* note 148, at 22. To obtain a contract, firms were required to submit a franchise application, pass an audit, and then bid for a government contract to provide legal aid services in a particular area. See *id.*

<sup>148</sup> See Clarke et al., *supra* note 147.

<sup>149</sup> See *id.* The number of firms that applied was 5,000, out of over 11,000 offices conducting legal aid services. See *id.*

<sup>150</sup> See *id.*

<sup>151</sup> See Clarke, et al., *supra* note 147.

the number of legal aid firms will drop from 11,000 to 6,000 once the franchise application process is complete.<sup>152</sup> Consequently, as a result of the Justice Act's legal aid franchising requirement, many legal aid firms' capacities to provide such services will inadvertently be eliminated. By requiring specialists to practice some areas of litigation, the government will be shutting off sectors of the market to firms that do not formally qualify, and in doing so, lower the quality and competitiveness of the franchises.<sup>153</sup> The biggest danger of the Justice Act is that quality and standards could potentially be sacrificed to cost efficiency, and that large franchising firms may become captive to the government.<sup>154</sup>

Only 2,724 firms held legal aid franchises, a number much lower than the 6,765 who sought franchises on January 31, 1999.<sup>155</sup> In order to qualify as a franchise, firms need to be accepted by a bid panel, submit their franchise application, pass a preliminary audit, and then bid for a contract. Firms seeking to practice family, immigration or mental health law are automatically granted a contract after passing the audit.<sup>156</sup> The remainder of the civil aid system will come under contract beginning next year.<sup>157</sup> Consequently, poor people can no longer walk into any firm off the street expecting to receive advice and legal assistance. Clients seeking legal aid must now locate a franchise that contracts with the LSC to provide government aid.

Small firms and sole practitioners will be most affected by the franchising requirements, mainly because they do not have the staff necessary to process new legal aid paperwork and do not meet the financial threshold required to become a franchise.<sup>158</sup> Vulnerable practitioners who cannot adapt to the newly-imposed legal aid rules will have few options: diversifying, merging with contracted franchises, or closing shop.<sup>159</sup> "The old system whereby solicitors chose where they would practice and what services they would offer is being swept aside. In the future, we [the LAB] will show solicitors where there is a market. It will then be up to them to develop and manage it."<sup>160</sup> These restrictions on firms' practice develop-

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<sup>152</sup> See *id.*

<sup>153</sup> See Orchard, *supra* note 145.

<sup>154</sup> See Note, *Legal aid contracting: U.S. lessons*, 148 NEW L.J. 1702 n.6865 (1998).

<sup>155</sup> See *supra* note 147.

<sup>156</sup> See *id.*

<sup>157</sup> See Note, *supra* note 154.

<sup>158</sup> See Clarke, et. al., *supra* note 147 (quoting Andrew Otterburn, a management consultant).

<sup>159</sup> See Clarke et al., *supra* note 147.

<sup>160</sup> See *id.* (quoting Mr. Orchard, LAB Chief Executive).

ment and areas of expertise demand immediate restructuring and flexible management, things most small firms lack.

The criticisms of both conditional fee arrangements and franchising requirements run counter to the purposes driving these reforms. The Justice Act seeks to ensure that the poor pay as much as they can afford for legal services, reduce frivolous claims, encourage efficiency in administrative processes, and minimize the extent to which legal aid puts other litigants in less favorable financial positions.<sup>161</sup> The Justice Act also seeks to have legal aid services provided by better-qualified and financially solvent solicitors and firms. Ironically, legitimate concerns regarding the Access to Justice Act are that it will fall short in efficiency, quality, and integrity. Both franchising requirements and the risk associated with CFAs will significantly impede access to counsel short-term. Franchising reduced the number of legal aid lawyers eligible to provide aid, and the conversion of legal aid funding to CFAs disqualifies people from obtaining free legal counsel. As a result, there are fewer lawyers to provide indigents with services, and those no longer capable of receiving aid must find lawyers willing to extend CFAs for them.

### C. *The Right to a Jury Trial*

Another right guaranteed by the Human Rights Act, the right to a jury trial, is being hotly debated by the Government and Bar. A proposal suggesting that criminal defendants no longer have the right to elect a jury trial surfaced in 1997, and again in 1998, prior to the enactment of the Rights Act.<sup>162</sup> The proposal, which endorses denying criminal defendants the right to choose a jury trial, particularly if they have prior convictions,<sup>163</sup> was set forth in a consultation paper by the Home Office in October of 1998.<sup>164</sup> The paper rationalized this reform in the interests of diminishing expense and in the administration of criminal justice.<sup>165</sup> The option to elect a jury trial has been referred to by supporters of the consultation paper as permitting defendants to manipulate the system.<sup>166</sup> The opposition to the 1997 reform proposal was so great that it was dismissed;<sup>167</sup> likewise, the

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<sup>161</sup> See Lord Chancellor, *supra* note 41, at para. 3.7.

<sup>162</sup> See Heather Hallet, *Human Rights and the Bar*, 148 NEW L.J. 1453 n.6858 (1998).

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See Hallet, *supra* note 162.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.* at 1453.



opposition to the 1998 consultation paper was overwhelming. The Bar Council, the Law Society, and the Legal Action Group are all vehemently opposed to eliminating a defendant's right to choose a jury trial.<sup>168</sup> Therefore, by all appearances the legal community accepts the jury trial as a fundamental right, but it is unclear whether such unanimous support is powerful enough to prevent the installation of the reform.

It is important to note that defendants were not always permitted jury trials. Until the Administration of Justice Act of 1885, "cases were either triable summarily or on indictment."<sup>169</sup> Relatively speaking, trials by juries are a modern procedure, and have never been a guaranteed right in Britain. Now that the Human Rights Act has been passed, however, a reform eliminating a defendant's right to elect a jury trial might be in violation of Article 6, which provides criminal defendants with the "right to a fair trial." If a defendant can show that she is prejudiced by being denied the election of a jury, then she would have an action under Article 6 of the Rights Act.

The right to a jury trial is pivotal to a defendant's ability to receive a fair trial. The Home Office stated in its consultation paper "that it is concerned not with the merits of jury trial, but only with the defendant's ability to choose it."<sup>170</sup> It is easy, then, to see why the legal community is up in arms over this proposal because the right to a defense and a fair trial run to the very political and civil rights embraced by the human rights movement and the domestication of the ECHR through the Human Rights Act. Hence,

[f]ew would deny that a jury trial is superior to a trial before the magistrates and that there is a greater chance of seeing justice done at the Crown Court than at the magistrates' court, if only because greater time, trouble and money are spent on jury trials. In any case, therefore, where the State decides to charge a defendant with an allegation of dishonesty or an offence of similar gravity, the defendant must have the right to choose trial by jury.<sup>171</sup>

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<sup>168</sup> See Hallet, *supra* note 162.

<sup>169</sup> See *id.* at 1453.

<sup>170</sup> *Id.* (quoting the Home Secretary's intent in his proposal to eliminate defendants' rights to elect a jury).

<sup>171</sup> Hallet, *supra* note 162.

## IV. PROPOSALS FOR SUCCESSFUL DUAL-ENFORCEMENT OF THESE REFORMS

The enactment of the Human Rights Act calls into question whether the new Legal Services Commission possesses an affirmative duty to promote and enforce Article 6 provisions, since conflicts between the Justice Act and Rights Act are bound to arise.<sup>172</sup> In other words, the Legal Services Commission may have the duty to notify and educate people how to assert their rights under the Rights Act in order to remain in compliance with Article 6.<sup>173</sup> There is no provision in the Rights Act creating a Human Rights Commission, nor for educating the public about its rights or offering advice for human rights claims.<sup>174</sup> One interpretation of the domestic duties created by the Rights Act suggests that solicitors will have to notify clients of their rights, including mentioning the rules on inferences being made from witness' silence contained in the Rights Act.<sup>175</sup> Since there is not a separate commission to enforce the Rights Act and assist people seeking to assert their rights under the Rights Act, that burden then falls upon the Legal Services Commission. This creates a difficult scenario, however, because the Legal Services Commission also has the duty to enforce provisions under the Justice Act. The discord in permitting one commission to manage both acts is apparent: promoting court access while simultaneously looking to minimize legal aid expenditures.

It behooves the Crown to establish a Human Rights Commission to monitor the Rights Act, and keep apprised of domestic and European Court decisions that define and will set the standards under which the Rights Act operates. Since the Rights Act provides domestic remedies for ECHR provisions, issues of legal rights and related government responsibilities will crop up quickly. Since the Rights Act is not yet in full force, the time is right for the Crown to implement a Human Rights Commission. Not only would a Human Rights Commission be imperative to eliminating inherent funding conflicts between the Access to Justice Bill and the Rights Act, but it would be an excellent way to further the Rights Act's aim. Without a Human Rights Commission, there is no effective way for the public to assert its rights under the Act.<sup>176</sup> It is up to solicitors to make arguments or

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<sup>172</sup> See *supra* note 66 at 20.

<sup>173</sup> See Wadham, *supra* note 120.

<sup>174</sup> See *id.*

<sup>175</sup> See Wadham *supra* note 120 (quoting Paul McGee, Legal Officer at the Campaign for the Administration of Justice).

<sup>176</sup> Geoffrey Bindman & Stephen Grosz, *The Human Rights Act 1998: Recent Developments*, 95 L. SOCIETY GAZETTE 20 (Dec. 10, 1998).

claims under the Act before local courts, a capability that remains unperfected and lacking for many because so few have experience trying claims before the European Court. Since, for most solicitors, human rights issues are not an area of expertise, meritorious human rights actions might be overlooked. A commission could establish funding for human rights cases and educate the public.

The Crown should also produce a method by which it can regulate CFAs. A hotline hosted through the Legal Services Commission, for example, could refer callers unable to obtain a CFA to another firm or legal aid franchise. This would be a low-cost safeguard to guarantee that persons with civil rights claims are able to obtain court access either through CFAs or subsidized assistance. A "civil rights legal-need" hotline would minimize the new fee structures' chances of clashing with both the European and British Courts' interpretations of court access. Such a precaution could satisfy Britain's duty under the ECHR, and now perhaps the Rights Act, to provide access to legal counsel to persons pursuing civil rights petitions.

Another way to keep CFAs in check would be to have firms report to the LSC whenever a CFA is used as a payment method. This form could include pertinent data such as the claimant's damage award, the uplift amount and the nature of the suit. Statistical information would help the LSC assess what areas of law and what amounts of fees with what regularity are coming under CFAs. Once sufficient data is gathered, the LSC could modify or issue further guidelines on CFAs. This data could also be compared with statistics of prior cases that fell under former legal aid policies.

The LSC could also mandate firms accept CFAs for all civil rights claims. Since firms would be forced to take on risk in these instances, the LSC could pay the insurance premium for a CFA product for that matter. Or the LSC could require that all firms using CFAs purchase CFA insurance coverage. That way, all firms would be covered for risk-based financial losses and risk nothing in accepting CFAs. A less costly alternative might be for the LSC to require lawyers to call the LSC if a client wishes to bring a civil rights claim under a conditional arrangement, and the firm will not extend one. The LSC could then refer the client to a different firm or ascertain whether the client might qualify for government legal assistance.

The new franchising requirements will reduce the numbers of lawyers able to provide legal aid services. Small firms and solo practitioners are directly affected by the Justice Act's franchising requirement. While the requirements are necessary and will serve to enhance the quality of the counsel provided to indigents, there are fewer lawyers to supply such services. The LSC must manage changes including: the caseload of franchises, the numbers of indigents the LSC refers to franchises, the nature

of the complaints subsidized by legal aid, and the success of legal aid litigation. The LSC should be able to determine from the amount of caseload turnover, the number of suits handled, the cost per claim, and the number of indigents without active representation whether the current number of franchises is sufficient. The LSC should also look to geographic demographics, to curb shortfalls in rural legal aid franchises. If suddenly there is a dramatic drop in rural legal aid clients, the LSC might have to reexamine and loosen its franchising requirements to provide opportunities for small firms to contract for legal aid funding.

It is crucial that the Crown not deny citizens of their right to a jury trial. Article 6 of the Human Rights Act, once in full force, will lend a cause of action to a criminal defendant that is denied a jury trial under the "right to a fair trial" provision.<sup>177</sup> Although the ECHR and the Rights Act do not contain explicit provisions mandating the right to a jury trial, this right could implicitly be construed to fall under the "right to a fair trial" provision.<sup>178</sup> If a law is passed removing the right to a jury, the Crown is risking precedented standards for jury trials set by the courts.

#### V. CONCLUSION

The foreseeable problems with the implementation of the Human Rights Act lie in intrinsic conflicts between the Rights Act and the Access to Justice Act 1999. The Access to Justice Act 1999 creates reforms that are desperately needed by the inefficient and high-cost system, and does so by narrowing the spectrum of legal aid. The Justice Act achieves this by converting legal aid fees into conditional fee arrangements and shifting fees from the Crown onto clients. The Rights Act, on the other hand, effectively broadens the scope of legal rights to British citizens. This problem is complicated further by the fact that Britain has failed to create a Human Rights Commission. Essentially, the Legal Service Commission will have to assume the responsibility of enforcing both Acts, which will be anything but easy. The Legal Services Commission must compel compliance with the Access to Justice Act, while balancing the assertive duties imposed by the Rights Act in providing court access and rights to counsel. One commission cannot effectively endorse access to legal services while simultaneously controlling the legal aid purse. The government was short-sighted in not recognizing the complications that will arise from the LSC enforcing both Acts.

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<sup>177</sup> See generally HUMAN RIGHTS ACT, 1998, *supra* note 10, Article 6(1).

<sup>178</sup> See *id.*

CFAs, if monitored properly by the government, can satisfy the Crown's duty under the ECHR and Rights Act. What remains problematic, nonetheless, is that CFAs and alternative dispute resolution are not yet accepted by the mainstream legal profession. The negative ethical stigma that is attached to CFAs and the monetary risk involved for relatively little reward are stumbling blocks to the legal profession embracing these arrangements. Since solicitors were guaranteed payment for so long through legal aid funding, it will be a difficult transition, professionally, for lawyers to take on the risks involved with conditional fees. The government needs to recognize that the move from legal aid funding to CFAs displaces not only fees, but shifts risk and responsibility onto solicitors and clients.

These court access concerns are magnified by the strict nature of the franchising requirements under the Justice Act. Although franchising will inevitably improve the quality of legal assistance, the number of firms that can offer subsidized assistance is deficient. Few small or medium-sized firms have the financial resources and personnel necessary to be approved under the new legal aid contracting specifications. Although the LSC provides a reference list of legal aid solicitors on its website,<sup>179</sup> this is not a practical means for indigents to access referrals, especially if indigents do not know where to get help in the first place. The government needs to quickly resolve these shortcomings so that the objectives of both Acts might be realized in congruence.

It is crucial that the government not only establish a Human Rights Commission to manage the plethora of issues raised by the Rights Act, but also extend opportunities to the legal community to become educated in alternative dispute resolution and conditional fee arrangements. The sooner CFAs become the norm, the sooner more classes of people will gain court access. It is also important that people are educated as to the remedies available domestically under the ECHR. Although the enactment of the Rights Act demonstrates Britain's dedication to human rights, it needs to take the steps necessary to create an effective procedure by which the public can assert these rights domestically. The Human Rights Act has remarkable potential to create a human rights culture in Britain by embracing the aspirations of the ECHR. The government has indeed taken a large step in furthering human rights by enacting this legislation, but it needs to follow through in overseeing that these rights become accessible domestically.

The Access to Justice Act 1999 eventually will make lawyers and the courts available to people to whom they were previously unaffordable. Although the Justice Act eliminates the bulk of legal aid costs through re-

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<sup>179</sup> See Legal Services Commission website, (visited Apr. 21, 2000) <<http://www.legalservices.gov.uk>>.

classification into CFAs and mediation, people will not gain greater access to justice until these alternatives become prevalent. Once CFAs become more conventional, the public will attain substantial benefits. In the meantime, fears that court access will be diminished are very real. Domesticating the ECHR is a positive stride, but will provide little short-term benefit to uninformed citizens. The government needs to reassure the public and the legal community of its commitment to these Acts by instituting formal procedures to regulate and educate both lawyers and the public so that these Acts may be executed in tandem. Until Britain institutes these safeguards, citizens needing legal assistance will not be rescued by the legal aid safety net.

